LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 17 1968

No. 1258

In the Supreme Court of the United States

OCTOBER TERM, 1967

CITIZENS BANK OF HATTIESBURG, ET AL., PETITIONERS

v.

WILLIAM B. CAMP, Comptroller of the Currency of the United States

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1239

CITIZENS BANK OF HATTIESBURG, ET AL., PETITIONERS

v.

WILLIAM B. CAMP, Comptroller of the Currency of the United States

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

---

1. Petitioners sought a declaration that the approval by the Comptroller of the Currency of an application for the chartering of the Southern National Bank of Hattiesburg, a new national bank, was unlawful, and an injunction compelling the Comptroller to "withdraw and cancel [the] certificate of authority" granted by him to that bank. On January 24, 1967, the district court dismissed the complaint, ruling that the Comptroller's action in approving the application

was not arbitrary, capricious, an abuse of discretion, or lacking in an evidentiary basis (Pet. Apps. A and B, 27-36). The court of appeals affirmed, in a *per curiam* opinion (Pet. App. C, 37-38).[1]

On January 7, 1965, an application to organize the Southern National Bank, to be located in Hattiesburg, Mississippi, was filed with the Comptroller. The application was supported by a brief discussing in detail the economy of the area, the status of existing financial institutions, financial competition in the area, and the proposed economic structure, physical structure and operating policies of the new bank. A volume of exhibits also was submitted, containing statistical data on the population of the area and its projected growth, retail trade in the area, industrial and governmental employment, and the general financial situation of the community.

Among the points made by the proponents of the new bank, were that the population in Hattiesburg had grown steadily, a trend projected to continue for many years; that retail sales and the assessed value of land had risen sharply in recent years; and that a growing university was located in the community. The proponents noted that, notwithstanding this economic growth, no bank had been chartered in Hattiesburg since 1902, when petitioner Citizens Bank of Hattiesburg was organized.[2]

---

[1] A petition for rehearing was denied by the court of appeals on January 18, 1968 (Pet. App. E, 41).

[2] The only other bank in Hattiesburg had been organized in 1895.

The investigation of the proposal was assigned to a national bank examiner, who, on the instructions of the Regional Comptroller, called upon the two existing banks to give them the opportunity to express their views. Officials of these banks conferred with the examiner, and lodged lengthy written oppositions with the Office of the Comptroller (see R. 160-174). The Comptroller's office also wrote petitioner Brett, the President of Citizens Bank, that "[i]f you wish to submit any other data or be accorded a hearing in this Office, we shall be happy to meet with you here in Washington" (R. 175-176). Such a hearing was arranged for April 16, 1965 (R. 178). Prior to the hearing, Citizens Bank requested that it be furnished with the application of the proponents, and the materials supporting it (R. 179-180). This request was granted (R. 181), except for the omission of confidential financial and biographical information concerning the organizers (R. 703-704).[3]

At the hearing, Mr. Brett propounded at great length [4] his view that a new bank was not needed in Hattiesburg. The President of the other existing bank, the First National Bank, also spoke in opposition to the proposal. Counsel for the proponents spoke in its favor. On the day of the hearing, Citizens Bank also

---

[3] In addition, a list of proposed shareholders was omitted. The omitted material was submitted to the district court for *in camera* inspection.

[4] Although, as stated in the petition (p. 8), it was announced that each side would have 15 minutes, in fact the hearing lasted much longer, and the Deputy Comptroller who presided recorded in a memorandum of the hearing, that the President of Citizens Bank spoke "at great length."

submitted lengthy written oppositions to the proposal (R. 182-212, 267-278). At the close of the hearing, the opponents were granted until April 29, 1965, to file further materials. On April 27, 1965, Citizens Bank did submit further extensive written statements and exhibits (R. 214-239).

On May 28, 1965, upon the recommendations of his staff, the Comptroller gave preliminary approval to the application.[5] On August 18, 1965, after the new bank complied with technical and legal requirements, it was authorized to commence business (R. 637-640).

2. Apart from the question of petitioners' standing to maintain this action, on which the court of appeals did not pass (Pet. App. C, 37-38),[6] the present petition appears to raise two issues: (1) whether the Comptroller of the Currency in acting upon an application for a new bank charter must conduct an adversary hearing of the kind contemplated by Section 7 of the Administrative Procedure Act (5 U.S.C. (Supp. II) 556); and (2) whether a determination of the Comptroller approving a new bank charter is subject to review by a trial *de novo*. Both courts below correctly rejected petitioners' contention on these issues.

---

[5] The national bank examiner recommended against approval of the charter, but the remainder of the Comptroller's staff was unanimous in recommending approval.

[6] Petitioners make reference (Pet. 9) to the cases relied upon by the respondent in the court below in support of the position that, as mere prospective competitors of the proposed new bank, petitioners lacked sufficient standing to challenge the Comptroller's action in granting the charter. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, relied on by petitioners (Pet. 10), is plainly distinguishable (see 390 U.S. at 5-7).

Contrary to petitioners' suggestion (Pet. 13), there is no conflict among the circuits, and no occasion for further review. The decision below indeed is in complete accord with the only prior appellate decision in a similar bank charter case, *Webster Groves Trust Co.* v. *Saxon*, 370 F. 2d 381 (C.A. 8).[7]

a. It is settled that the Comptroller need not hold a formal adversary hearing before acting upon applications of this nature. *E.g.*, *Webster Groves Trust Co.* v. *Saxon, supra*, 370 F. 2d at 384-385; *First National Bank of Smithfield, North Carolina* v. *Saxon*, 352 F. 2d 267, 270 (C.A. 4); 1 Davis, *Administrative Law Treatise*, § 4.04. The Administrative Procedure Act requires the kind of formal adversary hearing specified by Section 7 of that Act (5 U.S.C. 556) only in certain rulemaking proceedings (see 5 U.S.C. 553), and in cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554). The chartering of a new national bank does not involve an adjudication required to be made after a formal agency hearing. Indeed, the governing statute, 12 U.S.C. 27, provides merely that the Comptroller may examine the facts "by means of a special commission appointed by him for the purpose of inquiring into the condition of such [national banking] association, or otherwise." When the APA was enacted the Attorney General's Advisory Committee on Administrative Procedure cited

---

[7]Another district court has reached a simliar result. *Warren Bank* v. *Saxon*, 263 F. Supp. 34 (E.D. Mich.). An appeal is pending in that case (C.A. 6, Nos. 17718-17719).

such determinations by the Comptroller, as an example of agency action not required to be made after an adversary hearing. *E.g.*, S. Doc. No. 8, 77th Cong., 1st Sess., p. 143; Monograph of the Attorney General's Committee on Administrative Procedure on Federal Control of Banking, S. Doc. No. 186, 76th Cong., 3d Sess., Part 13, p. 12.

b. Petitioners also challenge (Pet. 14-15, 20) the ruling below that the Comptroller's authorization of the charter was not subject to review by a trial *de novo*. Petitioners proffered in the district court the testimony of several bankers to the effect that the new bank, though it had proved successful beyond expectations (Def. Exh. 3), had not been needed in the community. This testimony was properly rejected. Petitioners had a full opportunity to—and did in fact—present to the Comptroller extensive written materials opposing the application (R. 160-174, 182-212, 213, 214-231, 231-239, 266-278), as well as to give their views at the informal oral hearing in the Office of the Comptroller. Prior to the hearing, petitioners were given the application of the proponents of the new bank, and the supporting economic data (with the exception of confidential financial information concerning the organizers) (R. 179-181).

There was, accordingly, no basis for the district court to conduct a *de novo* trial. Ordinarily a party which has had a fair opportunity to present its objections to an administrative agency may not overturn the agency action on the basis of materials, or grounds, not presented to the agency. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37. Moreover,

no statute provides for *de novo* review.[8] Instead, the chartering of new national banks, since the passage of the National Bank Act in 1864 (13 Stat. 99), has been considered an area over which the Comptroller has broad discretion in coming to a decision dependent upon "a congeries of imponderables * * * calling for almost intuitive special judgments" (S. Doc. No. 8, 77th Cong., 1st Sess., p. 143). It clearly would be destructive of that broad discretion for the district courts to decide independently whether bank charter applications should or should not be granted.[9]

The only previous appellate decision directly in point, *Webster Groves Trust Co.* v. *Saxon, supra*, also holds "that the action by the Comptroller is not

---

[8] Indeed, no statute provides for *any* review of the Comptroller's authorization of a new bank charter. Contrast the situation under the Bank Merger Act of 1966, which provides (12 U.S.C. (Supp. II) 1828(c)(7)(A)) that "the court shall review de novo the issues presented." See *United States* v. *First City Nat'l Bank*, 386 U.S. 361. Even where Congress has provided for review, "the reviewing function is one ordinarily limited to consideration of the decision of the agency * * * and of the evidence on which it is based * * * and * * * no *de novo* proceedings may be held." *United States* v. *Bianchi & Co.*, 373 U.S. 709, 714-715.

[9] Petitioners confuse the holding below that the Comptroller's action is not subject to review by a trial *de novo*, with a holding that the action is not subject to review at all. The court below did not adopt the latter view; rather, it held on review of the record that the Comptroller's action was not arbitrary or illegal (Pet. App. C, 37-38). Without deciding the precise scope of review which pertains to a bank charter case, the court below ruled that petitioners could not prevail on a scope of review at least as broad as that specified in *Webster Groves Trust Co.* v. *Saxon, supra*, 370 F. 2d at 387-388.

subject to trial *de novo*" (370 F. 2d at 387). Nor do the cases relied upon by petitioners conflict with the decision below. Both upheld a *de novo* review of the Comptroller's approval of an application for a branch bank, in circumstances in which the Comptroller had refused to make available most or all of his administrative files to either the opponents of the application or the reviewing court. *First National Bank of Smithfield, North Carolina* v. *Saxon*, 352 F. 2d 267, 272-273 (C.A. 4); *Peoples Bank of Trenton* v. *Saxon*, 373 F. 2d 185, 188-189 (C.A. 6). Lacking an administrative record on which it could be determined whether there was a rational basis for the agency action, the reviewing courts undertook to investigate the facts *de novo*. However, as the present case indicates, the Comptroller's practice has been significantly revised since those decisions were rendered.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 296763 713